Supreme Court, U. S.
FILED
AUG 12 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-520

ERNEST L. MONTANYE, former Superintendent of Attica Correctional Facility, *et al.*,

Petitioners,

—against—

RODNEY R. HAYMES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 1, 1974
CERTIORARI GRANTED JUNE 30, 1975

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Docket Entries—District Court.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civ. 1972-410

UNITED STATES OF AMERICA ex rel. RODNEY R. HAYMES v. ERNEST L. MONTANYE, Superintendent, Attica Correctional Facility and Agent, —— SMITH, Deputy Superintendent, Attica Correctional Facility.

Date	Proceedings
8-3-72	Filed Petition
8-3-72	Filed Decision & Order allowing filing in forma pauperis & order that correctional officials show cause why petitioner should not be allowed to proceed in forma pauperis—Curtin, J ret. 9/8/72 (notice & copy to petitioner & Mr. Lefkowitz, Blfo.) F-131
8-3-72	JS 5 made /adj. 9/15/72—submitted
9-11-72	Filed Respondents Affidavits in Opposition
9-29-72	Filed Petitioner's Reply
6-4-73	Filed Decision & Order dismissing petr's. application; permission to appeal in forma pauperis denied but allowing filing notice of appeal without payment. Curtin DJ Notices & copies Messrs. Schwartz & Lefkowitz. F-14
6-4-73	JS 6 made
6-18-73	Filed Petitioner's Notice of Appeal (copy mailed 6/19/73 to Mr. Lefkowitz and to Clerk, CCA with copy of docket entries)

Complaint-Petition.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

Petition For Civil Rights Action, Title 42, U.S.C.A. Sections 1983 and 1985:

The Petition of Rodney R. Haymes, respectfully shows:

1) That on the dates herein mentioned and referred to he was confined in the Attica Correctional Facility within the district for which this court sits;

That on June 9, 1972 he was transferred to Clinton Correctional Facility.

Plaintiff is presently serving a term of eighteen years imprisonment pursuant to commitment from Erie County.

2) That petitioner is a citizen of the United States of America and resides in the State of New York.

3) That this court has original jurisdiction in this action as stated in United States Code, Title 28, Section 1343:

"The district Court shall have original jurisdiction of any Civil Rights Action authorized by law to be commenced by any person".

"A" to recover damages for injury to his person or property or because of any deprivation of any right or privilege of a citizen of the United States by act done in furtherance of any conspiracy mentioned in section 1985, Title 42, U.S.C.A.;

Complaint-Petition.

"B" to recover damages from any person who fails to prevent aid in any wrong mentioned in section 1985, Title 42 U.S.C.A. which he had knowledge were about to occur and the power to prevent;

"C" to redress the deprivation under color of any state law, regulation or usage of any right, privilege or immunity secured by the Constitution of the United States.

STATEMENT OF FACTS

Your petitioner is extremely aggrieved by the unlawful and capricious abuse resulting in the actions by the Attica Correctional Facility Supt. Montanye, as herein set forth.

- That on June 7, 1972 while petitioner was still confined at Attica Correctional Facility, an Attica Correction officer approached petitioner in "A" block yard at Attica, where petitioner was at that time with two fellow Attica Liaison Committeemen Representatives, wherein petitioner and his two fellow Committeemen were discussing a legal petition addresed to this court—Hon. John T. Curtin—at which time this Attica officer informed this petitioner he had been ordered by Deputy Supt. Smith to bring your petitioner's "petition" to Deputy Smith. Your petitioner then informed this officer that this "petition" was a legal petition, addressed to Federal Court Judge John T. Curtin, by and on behalf of your petitioner herein and the 100-150 other Attica inmates contained therein for the redress of grievances. Your petitioner further advised this officer that as a result of the Dept. of Corrections own directive, administrational bulletin #20, paragraph 10, any communications or correspondence to any court is privileged and confidential correspondence that will not be censored or read.

Following the above colloquy between your petitioner and the abovementioned officer, this officer in turn advised your petitioner that he was acting under orders of his "boss" and would have to take my petition.

Your petitioner then advised his two fellow committeemen that he would have to obey this officer's orders for petitioner to stay in the right himself, and in turn informed the officers that petitioner would like to personally take his "petition" to the Deputy Supt. The officer stated that he would allow petitioner to take his "petition" to Lt. Glor.

Your petitioner was then taken to Lt. Glor and was in turn informed by Lt. Glor that Supt. Montanye had ordered him to take your petitioner's "petition" to him. Your petitioner then again informed Lt. Glor that this "petition" was a "legal petition" addressed to Federal Court Judge John T. Curtin for the redress of grievances, by and on behalf of himself, and the 100-150 other Attica inmates contained therein. That this legal petition was privileged and confidential and came under administrational bulletin #20, paragraph 10.

Lt. Glor then informed your petitioner that he was under orders to take my "petition" to Supt. Montanye, and that he (Lt. Glor) thought that Supt. Montanye would return petitioner's "petition" to him after he read it.

Your petitioner then informed Lt. Glor that he was handing his "petition" over to him against his free will and under duress of orders.

That on June 8, 1972 petitioner wrote a note to respondent Montanye, attached herein marked Exhibit "A", wherein petitioner asked for the return of his "legal petition", or to be called in front of respondent Montanye.

Your petitioner further advised Supt. Montanye in this note that the "petition" that he had taken from your petitioner is a "legal petition" to Federal Court Judge

John T. Curtin for the redress of grievances by and on behalf of himself and all those inmates contained therein.

On the afternoon of June 8, 1972 petitioner was informed that he was being transferred to Clinton Correctional Facility.

That on June 19, 1972 your petitioner again wrote to respondent Montanye from Clinton, requesting the return of petitioner's petition that was confiscated from your petitioner on June 7, 1972, by order of the within respondents.

That petitioner has received no reply from the within respondent either to petitioner's note of June 8, 1972, or petitioner's letter of June 19, 1972, nor has your petitioner been returned his legal petition that was taken him from on June 7, 1972 by orders of the within respondents.

Your petitioner submits to this Court that the actions herein so far described in this action, as performed by, or on orders of the within respondents, are in violation of your petitioner's federally guaranteed constitutional rights pertaining to access to the courts and petitioner's federally guaranteed constitutional right to petition the courts for the redress of grievances as well as equal protection.

Petitioner further contends that the reason for his transfer from Attica to Clinton the day following the confiscating of the "legal petition," was obviously the result of the above respondent's conspiracy from keeping the petitioner from pursuing the return of this "petition", or from re-continuing with this action, as well as an intent to remove this petitioner from the jurisdiction of this court, both on the actions contained herein, as well as further assisting those plaintiff inmates contained in Civ. 1972-230 and Civ. 1972-249, presently on file in this district court

Petitioner further states that all of the above actions already set forth by the within respondent in confiscating this petitioner's "legal petition" by and on behalf of him-

Complaint-Petition.

self and other 100-150 Attica inmates contained therein; of removing your petitioner from his job assignment as law clerk at Attica Correctional Facility on June 7, 1972 (the morning prior to the confiscation of this legal petition that same afternoon) and of shipping your petitioner to Clinton Correctional Facility on June 9, 1972, was the direct result of administrational reprisals against your petitioner for assisting those inmates contained in Civ. 1972-230 and Civ. 1972-249; for assisting Attica inmate Louis Martinize #23379 in submitting his application to this Court in May, 1972; and from petitioner himself, along with those other inmates similarly aggrieved, attempting to petition this Court for the redress of grievances.

Conclusion

In conclusion it is submitted that the actions and conspiracy perpetrated by the within respondents are in violation of the United States and that these officials act under color of state law to violate federal laws and rights in violation of Title 18, sections 241 and 242 of the Federal Code Annotated.

That this conspiracy is also a violation of sections 1983 and 1985 of Title 42, U.S.C.A.

Wherefore, your petitioner prays that this honorable Court will afford him the granting of a hearing on this petition and also for leave to proceed in forma pauperis and for any further relief that this Court may deem just and proper.

(Sworn to by Rodney R. Haymes, July 6, 1972.)

District Court Decision and Order Allowing *in Forma Pauperis* Filing and Directing Respondents to Show Cause Why Petitioner Should Not Be Allowed to Proceed *in Forma Pauperis*.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

Petitioner pro se.

Petitioner, currently incarcerated at Clinton Correctional Facility, has submitted papers to this court which will be construed as an application for relief under the Civil Rights Act (42 U.S.C. § 1983; 28 U.S.C. § 1343).

Petitioner alleges that while discussing a legal petition to this court with fellow inmates in the prison yard of Attica Correctional Facility, he was approached by a corrections officer who advised that the petition had to be "brought over" to a certain deputy Smith. Upon protest by petitioner, he was allowed to personally bring the document to a Lieutenant Glor. Petitioner was informed that Lieutenant Glor was under orders to take the document to Superintendent Montanye. Petitioner protested but the document was confiscated.

On the following day, petitioner was informed that he was being transferred to Clinton Correctional Facility. Two subsequent letters to Superintendent Montanye from petitioner have failed to result in the return of the confiscated document.

The Clerk is directed to file petitioner's papers without the prepayment of filing fees.

District Court Decision and Order Allowing in Forma Pauperis Filing and Directing Respondents to Show Cause Why Petitioner Should Not Be Allowed to Proceed in Forma Pauperis.

Correctional officials are ordered to show cause on September 8, 1972 at 10:00 a.m. in Part II of this court at Buffalo, New York, why petitioner should not be allowed to proceed in forma pauperis. Petitioner need not be present at that time.

The answering papers shall be served on petitioner and he shall have twenty days to respond if he so desires.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: August 3, 1972

Affidavit of Douglas S. Cream in Opposition.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF ERIE
CITY OF BUFFALO } ss.:

DOUGLAS S. CREAM, being duly sworn, deposes and says:

He is an Assistant Attorney General of the State of New York, of counsel to Louis J. Lefkowitz, Attorney General of the State of New York and attorney for the respondents, and he is familiar with the petition herein.

Respectfully submitted are the affidavits of Edward V. Brady, Correction Officer and Notary Public at the Attica Correctional Facility, sworn to the 6th day of September, 1972, and Harold Smith, Deputy Superintendent at the Attica Correctional Facility, sworn to the 7th day of September, 1972, with Attachments "A", "B", and "C" annexed thereto, in opposition to the petition herein, and it is

FURTHER submitted that the said affidavits adequately and fairly answer the claims herein made by the petitioner.

A copy of this affidavit has been mailed to petitioner.

WHEREFORE, your deponent prays that the application herein be denied and that the proceeding be dismissed.

(Sworn to by Douglas S. Cream, September 11, 1972.)

Affidavit of Edward V. Brady in Opposition.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF WYOMING } ss.:

EDWARD V. BRADY, Correction Officer and Notary Public at the Attica Correctional Facility, being duly sworn, deposes and says that he is over twenty-one years of age and resides in Attica, New York.

My tour of duty in the above mentioned Facility consists of the supervision of the inmate law library and the notarization of any legal documents or writs which inmates may desire to submit to the courts, their attorneys, families or other interested parties.

The petitioner Rodney R. Haymes, was an inmate law clerk in the Attica Correctional Facility law library. He was relieved of his assignment as law clerk because of his continual disregard for the rules governing inmates and the use of the law library. He was instructed by me upon his being relieved of his assignment that the transfer in no way affected his being able to give legal assistance to other inmates provided proper procedure was observed. The day after his release, he had free use of the law library for whatever purpose he needed it.

As to the petition to the Hon. John T. Curtin, only one name of the eighty-three (83) signators has ever submitted a request for legal assistance to the best of my knowledge and belief. I emphatically deny that I have ever attempted to deny any inmate from receiving legal assistance. Further, I have never directly or indirectly attempted to circumvent the purpose of the law library or the inmate law clerks working therein.

(Sworn to by Edward V. Brady, September 6, 1972.)

Affidavit of Harold Smith in Opposition.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF WYOMING } ss.:

HAROLD SMITH, being duly sworn, deposes and says that he is over the age of twenty-one and resides on institution property. He is employed as Deputy Superintendent at the Attica Correctional Facility.

I have been Deputy Superintendent at Attica since March 30, 1972. The communication dated April 25, 1972 from Superintendent Montanye and displayed on the inmates cell block bulletin boards, has been in effect since my arrival and is still in effect. (Attachment "A")

Also attached and to be considered part of this affidavit is a copy of page eight (8) paragraph 21 of the Inmates Rule Book. (Attachment "B")

The attached petition (Attachment "C") was confiscated from inmate Rodney R. Haymes because of the rules and regulations in effect. This petition was being circulated in the recreation yard by inmate Haymes. Inmate Haymes had never requested permission from the Superintendent to circulate the petition nor had any inmates requested that he be permitted to assist them. His circulating the attached petition was in in direct disregard of the above rule forbidding legal assistance except with the approval of the Superintendent. Inmate Haymes having been an inmate law clerk in the law library was cautioned on several occasions about assisting other inmates without their having submitted a request for assistance and having received proper approval.

I have requested Correction Officer Edward V. Brady, law library supervisor to submit an affidavit as to whether or not any of the signators have ever submitted requests to obtain legal assistance.

(Sworn to by Harold Smith, September 7, 1972.)

Notice From Superintendent to Inmates, Exhibit "A" to Smith Affidavit.

Office of Superintendent

April 25, 1972

TO ALL CONCERNED:

In all instances where inmates desire assistance in the use of the Law Library, they are to present their problems to Correction Officer Brady, who will assist them to the extent necessary or will assign inmates on the Law Library staff to particular cases.

Under no circumstances are inmates to set themselves up as "legal counselors" and receive pay for their services.

ERNEST L. MONTANYE
Superintendent

Paragraph 21 of the Inmate Rule Book, Exhibit "B" to Smith Affidavit.

• • •

21. Inmates are prohibited, except upon approval of the Warden, to assist other inmates in the preparation of legal papers.

• • •

Confiscated Petition, Exhibit "C" to Smith Affidavit.

Hon. Judge John T. Curtin:

I am writing to complain that I am now being deprived of legal assistance as a result of inmate Rodney R. Haymes and John Washington being removed from the prison law library.

Since the removal of the above two from the law library, I cannot any longer obtain any legal assistance either in the nature of obtaining the proper applicable case law corresponding with the particular issue contained in my case, as well as assistance in preparing my post-conviction application to the courts.

The major problem and reason for my not being able to obtain legal assistance is a direct result of the attitude displayed by the law library officer whom goes out of his way to circumvent inmates legal assistance.

I feel that this was obviously the same reason why this officer has had Rodney Haymes and John Washington removed from the law library whereby they no longer have proper access to either the law books or myself and the other inmates whom they are legally assisting.

Wherefore, I feel that my constitutional rights to adequate access to the courts for judicial review and redress is being violated as a direct result of the circumstances and conditions herein set forth.

(Signed by 82 inmates.)

Motion to Amend.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

MOTION TO AMEND PURSUANT TO RULE 15

Rodney R. Haymes respectfully moves for permission of this honorable Court to amend his original application that was entered in the office of the Clerk of the United States District Court, W.D.N.Y., by order of the Court on the day of , 1972, bearing docket # 1972-410, to include the above named respondent, Edward Brady, and to further include the following raised issue and claim under "Answering Affidavit in Rebuttal" herein attached.

(Sworn to by Rodney R. Haymes, September 26, 1972.)

Affidavit of Rodney R. Haymes in Rebuttal.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

RODNEY B. HAYMES, being duly sworn, deposes and says:

That he denies each and every allegation set forth by the within respondents which claim, or tend to claim that the within respondents have not violated this plaintiff's Constitutional rights.

More specifically, plaintiff denies correction officer Edward Brady's statement that this petitioner was relieved of his assignment as law clerk as a result of plaintiff's disregarding any established rules or regulations governing inmates and the use of the law library.

Petitioner further denies as totally untrue Officer Brady's statement that he advised this plaintiff that his release from the law library as law clerk would in no way affect his being able to give legal assistance to other inmates.

The fact of the matter is that the day following this plaintiff's release from the law library, your plaintiff was called to the law library upon his request for the purpose of researching his own court cases. At that time your plaintiff sat in the law library from approximately 9:00 A.M. until 11:00 A.M. and was refused by Correction Officer Edward Brady the legal references that this plaintiff requested, by stating that he (Officer Brady) did not know how to locate the legal cases that your plaintiff requested. Furthermore, when your plaintiff finally requested permission to go to the book racks himself so that he could himself pull out the reference he wanted, respondent Edward Brady refused this also, hence, your petitioner sat in the prison law library from

9:00 A.M. until 11:00 A.M. without ever receiving any of the legal material that he had come to research.

Petitioner also further denies Officer Brady's statement that he has never attempted to circumvent the purposes of the law library or the inmate law clerks therein.

In addition to the actions already set forth above, your plaintiff states under the penalty of prosecution for perjury, that on many numerous occasions he had personally witnessed this Officer Brady willfully furnish various Attica inmates with improper and damaging legal advice as to the proper applicable law on a certain given legal point, as well as the proper cause of action thereto.

Furthermore, when your plaintiff would attempt to take the misguided inmate aside in order to properly set him on the proper course, this Officer Brady would tell your petitioner, or John Washington, that he didn't want us giving legal advice to inmates. If your plaintiff had access to his former law partner John Washington (who is incidentally presently confined in the "box" here at Clinton Corr. Facility) your plaintiff would undoubtedly be able to obtain an affirmation from Mr. Washington to this effect.

Your plaintiff further, contemptuously, denies Officer Brady's statement that he has never refused an inmate legal assistance. Inmates John Kruth and Theodore McCain are two inmates who were refused their requests for legal assistance from your plaintiff and John Washington by this Officer Brady in the presence of both your plaintiff and John Washington. See Civ. #1972-230 and Civ. #1972-249.

At the time that Officer Brady refused the above two inmates legal assistance, this plaintiff advised both John Kruth and Theodore McCain to write to this Court for possible redress.

Petitioner further charges Officer Brady with writing and submitting a false report wherein he previously ac-

cused this plaintiff of attempting to undermine the administrational function of the prison law library at Attica. As a direct result of this false accusation this plaintiff was expelled from his assignment as a law clerk.

Plaintiff states that the reasons involved in this Officer Brady submitting this false report against this plaintiff was a direct result of your plaintiff assisting inmates John Kruth, Theodore McCain et al. in submitting their grievances to this Court on the issue of inmates legal assistance.

Plaintiff respectfully moves that he be allowed to amend his original application under Rule 15 of the Federal Rules of Civil Procedure to include Officer Brady as a respondent in this action for the above described actions in depriving this plaintiff adequate and equal access to the prison law library and for submitting a false report against plaintiff out of an act of reprisal against your plaintiff for exercising his constitutional rights.

Your plaintiff respectfully moves for the above requested amendment rather than having to file a separate action. With respect to administrational Rule #21 referred to in the affidavit by the within respondent Harold Smith, plaintiff would like to state for the record the fact that he was never at any time during his commitment to Attica Correctional Facility from August 10, 1971 until June 9, 1972 furnished with an institutional rule book, and that furthermore, plaintiff knows as a matter of fact that no rule books have either been published or distributed to inmates at Attica Correctional Facility since approximately 1969. This fact has also been admitted to recently in a public statement by the within respondent Ernest L. Montanye wherein he was quoted by the Buffalo Evening News as stating that he was attempting to establish, along with the assistance of the Attica Liaison Committee, a temporary rule book pending revisal of a Departmental rule book governing inmates conduct.

Affidavit of Rodney R. Haymes in Rebuttal.

In regards to the communication dated April 25, 1972 as attached to the affidavit of Dep. Supt. Harold Smith, your petitioner has already expressed his position concerning the validity of this particular order as governing inmates legal assistance procedures as were revised and set forth in the cases of Civ. # 1972-230 and Civ. # 1972-249.

Plaintiff states that as a direct result of the manner and attitude displayed by the within respondents, particularly that of Edward Brady, and as a result of the inadequate and restrictive manner in which the within respondents conduct and allow and/or disallow legal assistance from one inmate to another, most inmates who do seek legal assistance are either denied such, or are purposely misled by the respondent Edward Brady. Furthermore, those inmates who are interested and willing to help other inmates with their legal work, such as your plaintiff, are either denied, put off, and at all times subjected to harassment.

Plaintiff further respectfully contends that the policy set forth by the within respondents governing inmates legal assistance, as well as attachment "A" included in the answering affidavits of respondents Harold Smith and Edward Brady, do not adequately comply with the standards proscribed in *Johnson* v. *Avery, Stevenson* v. *Mancusi;* nor those established in *Younger* v. *Gilmore.*

Furthermore, in *Stevenson* v. *Mancusi,* this very same Court ruled that departmental rule 21 (Attachment "B" in respondent's reply) were unreasonable, and further enjoined the State from enforcing this same rule.

Plaintiff states that the rule set forth in the respondent's answering affidavit regarding inmates legal assistance are so vague as to be both arbitrary and capricious, and furthermore, the manner in which this rule is presently being processed and distributed, is in fact, both arbitrary and capricious, as well as biased and discriminatory, both on the part of the inmate who seeks legal assistance, and that of the inmate who offers legal assistance.

Affidavit of Rodney R. Haymes in Rebuttal.

There are absolutely no guidelines or criteria set forth, or practiced, in the rules contained in the respondents' answering affidavit that establish under what conditions an inmate will be granted another inmate's legal assistance, and under what conditions he may be refused such assistance.

Plaintiff further states that it is apparent to him both from the vagueness of the department's rule as well as the manner which your plaintiff has personally been treated by the within respondents in attempting to furnish what legal assistance he could to other inmates, that, the respondents do not act in good faith in trying to establish a policy whereby an inmate who is trying to obtain, or furnish legal assistance, can accomplish the same.

Plaintiff further submits that, because of his efforts to furnish Attica inmates with legal assistance, rather than merely hand out a law book to an inmate, he was harassed, intimidated, removed from his assignment as law clerk in the prison law library, had his legal "petition" for the redress of grievances to this court taken from him, and subsequently kept from being submitted to this Court for a period of three months, and finally shipped from Attica to Clinton in an obvious conspiracy attempt to separate this plaintiff from the other inmates who were also petitioning the Court for redress concerning the inmates legal assistance, all of which were direct acts of reprisal by the within respondents against your plaintiff herein for attempting to exercise his own Constitutional rights and in attempting to assist other inmates in securing their Constitutional rights.

More important, is the fact that with respect to the "petition" herein at issue, (attached to the respondents' reply) plaintiff denies that he was rendering any legal assistance. Plaintiff states that he merely wrote a letter to this Court upon being requested to do so by the numerous Attica inmates, and, although there was an existing policy that an

inmate had to first request, and presumably receive permission before assisting another inmate in preparing a writ etc., it is likewise standard policy that any inmate can, at any time, without having to obtain permission in any manner, write a letter for any other inmate.

In any event, your plaintiff submits that in all reality he was not furnishing legal assistance at that time, but was merely writing a letter to this Court in behalf of himself and those inmates whom collectively requested that he do so, for the *real purpose* of gaining adequate access to legal assistance.

Your plaintiff also wishes to point out that this letter and petition was a legal document to this Court, and that the officer Lieutenant involved in confiscating this petition was, in fact, appraised of this fact prior to your plaintiff having this "petition" taken from him.

Attached herewith, marked attachment "A" is a copy of a letter from Mr. Charles Kitzen, Esq., who represents West Publishing Co., in a contract with the State Dept. of Corrections to train inmates in legal research and establishing of an inmates legal aid program. This letter by Mr. Kitzen will show a small bearing on his appraisal of the correction officer in charge of the prison law library—respondent Edward Brady.

Plaintiff intends to call Mr. Kitzen as a material witness if necessary.

Plaintiff concludes that under no circumstances can the within respondents justify the confiscating of his legal "petition", particularly in view of the length of time involved in unlawfully retaining custody of the within referred to "petition" and in keeping your plaintiff herein, along with the other inmate co-petitioners contained therein from submitting this "petition" to this very Court for the redress of grievances thereto.

Your plaintiff respectfully asks for compensatory and punitive damages awards in the following amounts.

Fifteen hundred dollars for compensatory damages, and fifteen hundred dollars for punitive damages.

The $1,500.00 compensatory award in retribution for the three month period in which the within respondents unlawfully retained custody of plaintiff legal "Petition" and thereby kept your petitioner herein from submitting this same "petition" to this very Court for redress of grievances.

The 1,500.00, punitive award is asked in compensation for the various acts of reprisals taken against this plaintiff by the within respondents, as set forth herein and in plaintiffs original applications, or, in the alternative, that an evidentiary hearing be granted on or as soon thereafter the 10th day of October, 1972 for the purpose of offering further evidence on the issues herein raised.

See: *Security & Exchange Comm.* v. *Frank,* 388 F.2d 486, 490, 492;
Greene v. *Bd. of Control of Florida,* 335 F.2d 752, 753;
Sims v. *Greene,* 161 F.2d 87;
City Line Center v. *Lowes,* 178 F.2d 267;
Haines v. *Kerner,* 40 U.S.L.W. 4156 U.S.

(Sworn to by Rodney R. Haymes, September 26, 1972.)

Letter to John Washington, Exhibit "A" to Haymes Affidavit.

WEST PUBLISHING COMPANY
INCORPORATED
170 OLD COUNTRY ROAD, MINEOLA, N. Y. 11501

TEL. 516/248-1900

May 17, 1972

Mr. John Washington # 24261
State of New York
Department of Correctional Services
Attica Correctional Facility
Attica, New York 14011

Dear Mr. Washington:

I am replying to your letter of April 21. Frankly, I am amazed to hear that you are still having difficulties with the correctional officer in charge of the law library.

I have conveyed to Mr. Victor Zuckerman, an attorney with the Department of Corrections, the difficulties you are having and that I experienced when I last visited Attica. Mr. Zuckerman has informed me that "this question is being carefully considered by the Department and a resolution is expected shortly."

During telephone conversations with Mr. Zuckerman he has strongly implied to me that the State Department would implement rules clearly assuring free access to the law library for all inmates, including a formalization of rules guaranteeing the rights of inmates to help other inmates in preparing other legal materials.

Letter to John Washington, Exhibit "A" to HAYMES *Affidavit.*

For my own part, I wish you to know that we have advised the Department of Corrections that there is no point in our training at Attica until such changes are made. I have every reason to believe that the Department, because of all of these factors, will shortly implement these rules.

I was impressed by both you and Mr. Haymes and I am sure, being the good lawyers that you are, that you are well aware of the Stevenson v. Mancusi case, which directly applied the Johnson Avery [sic] doctrine to Attica. If you have not read it or do not know about it, you had best remove yourself from my class!

Cordially yours,

CHARLES KITZEN

Opinion and Order of the District Court, June 4, 1973.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 1972-410

UNITED STATES OF AMERICA ex rel. RODNEY R. HAYMES,

Petitioner

—vs—

ERNEST L. MONTANYE, Superintendent, Attica Correctional Facility, and Agent . . . . . SMITH, Deputy Superintendent Attica Correctional Facility,

Respondents

This action began with a communication from petitioner to this court alleging that a document was seized from him by correctional authorities. Petitioner also alleged that two days after this document was seized, he was transferred from Attica Correctional Facility to Clinton Correctional Facility. Petitioner further alleged that two subsequent letters to Superintendent Montanye failed to effect the return of the confiscated document to petitioner.

In an order dated August 3, 1972, this court construed petitioner's communication as an application for relief under the Civil Rights Act (42 U.S.C. § 1983; 28 U.S.C. § 1343), and ordered the respondents to show cause why petitioner should not be allowed to proceed further.

Included in respondents' answering papers to that order is the confiscated document that is the subject of this action. This document is in the form of a letter to this

court, signed by 82 Attica inmates, charging that, because of the removal of petitioner as a law clerk in the prison library at the Attica Facility, they are denied adequate access to the courts. Also included in respondents' answering papers are affidavits from Edward V. Brady, Correctional Officer at the Attica Correctional Facility, and Harold Smith, Deputy Superintendent at the Attica Correctional Facility. These affidavits state that not long after petitioner's removal from his position as clerk in the law library at the Attica Correctional Facility, he was seen circulating a document in the recreation yard of the Attica Facility. Pursuant to the Attica rules which forbid inmates to provide legal assistance to other inmates without the approval of the Superintendent, the document was seized from him.

Petitioner submitted a reply to respondents' affidavits in which he moved to amend his original application to include Edward Brady as a respondent. That motion is granted and Mr. Brady is named as a respondent.

Subsequent to petitioner's reply, Herman Schwartz and Edward I. Koren of Buffalo, New York, who were retained as counsel by petitioner, have submitted a memorandum of law.

The court will consider each claim raised by petitioner and his counsel separately. Petitioner's original communication to this court alleges that the document seized by correctional authorities was a "legal petition" addressed to this court. He maintains that the seizure denies him adequate access to the courts. In response to this allegation, respondents state that the rules of the Attica Correctional Facility provide that inmates can give legal assistance to other inmates only if the request for such assistance is made through the law librarian of the Attica Facility.

Opinion and Order of the District Court, June 4, 1973.

This rule is not unreasonable as long as permission for inmates to assist each other is freely given. *See Johnson* v. *Avery,* 383 U.S. 483 (1969); *Sostre* v. *McGinnis,* 442 F.2d 178, 201 (2d Cir. 1971); *United States ex rel. Stevenson* v. *Mancusi,* 325 F. Supp. 1028 (W.D.N.Y. 1971); *In the Matter of the Application of William J. Kruth,* Civil No. 1972-230 (W.D.N.Y., Nov. 14, 1972).

The affidavit of Edward V. Brady, the law librarian at the Attica Facility, states that none of the 82 signatories of the seized letter ever asked for legal assistance. Petitioner's response to the affidavit does not controvert this fact. The court finds there has been no violation of petitioner's rights under *Johnson* v. *Avery, supra,* and subsequent cases.

Counsel for petitioner views the facts in this case somewhat differently, arguing that petitioner was not providing legal assistance to other inmates but was circulating a document seeking joint action to protest certain prison conditions, and that in retaliation for circulating this document, it was seized and petitioner was subsequently transferred. However, the court determines that, under the circumstances, the authorities had the right to seize the petition. *Christman* v. *Skinner,* 468 F.2d 723, 725 (2d Cir. 1972). The petitioner's right to communicate with the court or with counsel was not infringed.

The transfer of the petitioner from Attica to Green Haven did not violate petitioner's rights. Although a general allegation is made that punishment was the motive for the transfer, there is no allegation that the facilities at Green Haven are harsher or substantially different from those afforded to petitioner at Attica. *See Wells* v. *McGinnis,* 344 F.Supp. 594, 596 (S.D.N.Y. 1972). Petitioner's transfer was consistent with the discretion given to prison officials in exercising proper custody of inmates.

Petitioner's application is dismissed.

Opinion and Order of the District Court, June 4, 1973.

Permission to appeal in forma pauperis is denied, with the qualification that the Clerk is directed to file a notice of appeal from this decision without the prepayment of the filing fee.

Further requests for permission to appeal in forma pauperis should be directed, on motion, to the United States Court of Appeals for the Second Circuit, Foley Square, New York City, in accordance with the requirements of Rule 24(a) of the Federal Rules of Appellate Procedure.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: June 4, 1973.

Opinion of the Court of Appeals for the Second Circuit, October 4, 1974.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. RODNEY R. HAYMES,

Petitioner-Appellant,

against

ERNEST L. MONTANYE, Superintendent, Attica Correctional Facility, ... Smith, Deputy Superintendent, Attica Correctional Facility,

Respondents-Appellees.

Before: KAUFMAN, *Chief Judge,* SMITH and TIMBERS, *Circuit Judges.*

KAUFMAN, *Chief Judge:*

It is clear beyond cavil that American prisons have failed dismally to fulfill the ambition of contemporary penologists that prisoners should be treated and rehabilitated. Although it is impossible to deny that many are sentenced to prison as punishment, however, we cannot condone the idea that the mere fact of incarceration permits a prisoner to be punished at the whim of those charged with his confinement. Rodney Haymes, formerly an inmate at New York's Attica Correctional Facility, initiated this § 1983 action seeking damages for the confiscation of a "legal petition" which he circulated while in custody there, and for his alleged summary punishment two days later by transfer without a hearing to the Clinton Correctional Facility. We reverse the summary judgment dismissing his complaint.

Opinion of the Court of Appeals for the Second Circuit, October 4, 1974.

A brief recitation of the facts will aid in framing the issues we are called upon to decide. Haymes was discharged as inmate law clerk in Attica's law library on the morning of June 7, 1972. During the afternoon of that same day, prison authorities seized from Haymes a document which he was circulating among the inmates in the "A" block recreational yard. The writing, prepared by Haymes at the request of other prisoners and signed by 82 inmates, was addressed to Judge Curtin of the United States District Court for the Western District of New York. Although it requested no relief, the petition stated that the signatories were being deprived of legal assistance because of the removal of Haymes and John Washington, another inmate law clerk, from the library. The document charged that law library officer Edward Brady went "out of his way to circumvent inmates legal assistance." It also alleged this to be the reason for the removal of Haymes and Washington from their positions in the library.

Although no explanation for the confiscation was given at the time, Deputy Superintendent Harold Smith stated in an affidavit submitted in response to Haymes' complaint that the papers were seized because Haymes had not asked permission to circulate them, and none of the signers had requested legal assistance, despite the provision of Rule 21 of the Inmate's Rule Book:

> 21. Inmates are prohibited, except upon approval of the Warden, to assist other inmates in the preparation of legal papers.

While there is some question whether Rule 21 was in fact widely circulated,[1] Smith stated that Haymes had been cau-

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[1] Haymes stated in his affidavit submitted to the district court that he had never been given a rule book, nor had one been published since 1969.

tioned on several occasions not to assist other inmates who had not requested and received approval. A notice from former Superintendent Montanye, posted on the cell block bulletin boards April 25, 1972, also stated:

> In all instances where inmates desire assistance in the use of the law Library, they are to present their problems to Correction Officer Brady, who will assist them to the extent necessary or will assign inmates on the Law Library staff to particular cases.
>
> Under no circumstances are inmates to set themselves up as "legal counselors" and receive pay for their services.

Haymes protested the confiscation, asserting that the petition was protected as a special letter under Administrative Bulletin # 20, which provides:

> 9. Special correspondence to public officials: You may write to the President of the United States, Members of Congress, . . . and to any Judge. . . . The letter will not be read or censored.[2]

The real impact of the events leading to the seizure was felt when, two days later, on July 9, 1972, Haymes was transferred without a hearing from Attica to the Clinton Correctional Facility. Although both institutions are maximum security facilities, Clinton is several hundred miles farther away from Haymes' home in Buffalo. After his transfer, Haymes wrote twice to Superintendent Montanye

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[2] N.Y. Dep't of Correction, Administrative Bull. No. 20, Jan. 31, 1972. The Bulletin was published shortly after this court decided, in *Sostre* v. *McGinnis*, 442 F.2d 178, 200 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 *and* 405 U.S. 978 (1972), that censorship of inmate letters to courts, lawyers and public officials violated the first amendment rights of prisoners.

protesting the confiscation of the papers and requesting their return. He received no response.

Haymes then began this § 1983 action,[3] alleging that his transfer without hearing to Clinton, in retaliation for his disobedience of Rule 21, deprived him of due process. His complaint also alleged that the petition being circulated was not "legal assistance" but "special correspondence" protected by Administrative Bulletin # 20, and that its confiscation was therefore improper. He sought $1500 in compensatory damages for the time he was deprived of the document, and $1500 punitive damages "for the various acts of reprisals taken against" him. Haymes thereafter retained counsel. After considering affidavits and exhibits submitted to him, the judge, on Montanye's motion, "dismissed" Haymes's "application for relief under the Civil Rights Act." Since there is no indication that Judge Curtin found Haymes's claims to be frivolous, *see* 28 U.S.C. § 1915 (d), and because he considered matters outside the pleadings, *see* F.R.Civ.P. 12 (b), his disposition perforce was summary judgment. F.R.Civ.P. 56. Judge Curtin held that the seizure of the document, because it represented unauthorized legal assistance, was proper under Rule 21. He also found no violation of due process in Haymes's transfer. In effect, therefore, Judge Curtin decided that the alleged punitive nature of the transfer was not material. The district judge reasoned that, because no claim was made that "the facilities at Green Haven [sic] are harsher or substantially different from those afforded to petitioner at Attica," the defendants were entitled to judgment as a matter of law.

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[3] 42 U.S.C. § 1983 (1970). Although the case has been characterized throughout as a habeas corpus proceeding, the district court properly treated it from the outset as an action under the Civil Rights statute.

It is black letter law that the issue on an appeal from a summary judgment is whether the pleadings, affidavits, and other papers before the district court show a "genuine issue as to [some] material fact," requiring a trial, F.R.Civ.P. 56 (c). Haymes claims that the circumstances of his transfer raise two such issues: whether he was moved to Clinton Correctional Facility as punishment for his disobedience of prison rules and policies, and whether the effects of transfer were sufficiently harsh to make denial of a hearing a violation of due process. If the district court had permitted him to establish a punitive animus behind his transfer, the argument proceeds, he would not have been required to establish that Clinton's facilities were "substantially different" from those at Attica. Rather, Haymes argues, implicit in the very fact of his dislocation are deprivations at least as severe as those which may be imposed as punishment pursuant to the New York Correctional Rules and Regulations. Since some form of hearing is required before a misbehaving inmate can be made to suffer the specified sanctions, summary transfer for similar misbehavior may amount to a denial of due process. We see merit in this contention.

I.

We find it difficult, in the absence of a trial record, to look upon the circumstances of the transfer as a mere coincidence. The papers reveal that less than forty-eight hours after Haymes was ordered to cease collecting signatures without permission in the recreation yard, he was shipped to the Clinton Correctional Facility hundreds of miles away. But in granting summary judgment, the district court deprived Haymes of an opportunity to prove a causal connection between the two events, finding in effect that the harm he suffered did not warrant affording a

hearing irrespective of the motive for the transfer. We do not disagree with the assertion that not every inmate who must endure the burden alleged by Haymes deserves a full panoply of procedural armor. Removal of inmates to other facilities may be justified by any of a number of concerns quite proper to the administration of prison systems. One scarcely needs to be reminded of the sad events at Attica prison three years ago to understand the explosive potential flowing from the lamentable conditions which confront many prisoners. Although such circumstances neither excuse the need for reform nor justify sacrificing the inmate on the altar of security, they may on occasion render it necessary to take summary action to avert imminent riot. Overcrowding and the not unrelated hazards to health may also call for a prompt response by prison authorities. We certainly have no intention of unnecessarily placing prison officials in a straitjacket. But, generally, in such cases the reasons for transfer are extrinsic to the inmate's behavior, and the decision whether to transfer may not be advanced in any way by providing notice and a hearing to the transferee. Moreover, although the dislocation suffered by the transferred prisoner may be burdensome, the need to avoid more general harm may outweigh his individual claim.[4]

Transfer intended as punishment, however, presents a situation wholly different from the administrative removal of an inmate to another facility. When harsh treatment is meted out to reprimand, deter, or reform an individual,

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[4] After all these years of reviewing prison problems, we are not too myopic to notice the distinct possibility of arbitrary, misguided, or disingenuous invocation of administrative justifications for transfer. Although we must to some extent rely upon the good faith of prison officials, the individual inmate is not left unprotected against such abuses. *See Newkirk* v. *Butler,* Slip op. 3893, 3899 (2d Cir. June 3, 1974).

elementary fairness demands that the one punished be given a satisfactory opportunity to establish that he is not deserving of such handling. While some discretion may be appropriate in an administrative determination of the need to avoid violence and unrest, the specific facts upon which a decision to punish are predicated can most suitably be ascertained at an impartial hearing to review the evidence of the alleged misbehavior,[5] and to assess the effect which transfer will have on the inmate's future incarceration. Indeed, in situations where punitive sanctions other than transfer are imposed, the New York correctional system has established procedures which recognize both the demands of elementary fairness and the suitability of an impartial hearing. It is to those regulations that we now turn.

II.

Four years ago the New York Commissioner of Corrections published, pursuant to authority given him by statute, *see* N.Y. Correction Law §§ 112, 137 (McKinney Supp. 1974), Procedures for Implementing Standards of Inmate Behavior. 7 N.Y.C.R.R. §§ 250 *et seq.* These rules, presently in force, are intended to be applied in instances where an inmate violates a rule or regulation governing his behavior, or fails to comply with an instruction given him by an employee of the department of corrections. Section 250.1. The code provides that minor infractions may be dealt with merely by counsel, warning, or reprimand. Section 251.5. Other standards apply to more persistent refractory behavior, and to misbehavior involving danger

[5] *See Wolff* v. *McDonnell*, 42 U.S.L.W. 5190, 5196 (June 26, 1974) (holding that "[s]ince prisoners in Nebraska can loose good-time credits only if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.")

to life, health, security, or property. Reports of such conduct are required to be made in writing to the superintendent, §§ 251.4, 251.5(b), and are reviewed at least weekly by the prison adjustment committee. Section 252.3(a)-(c). The committee also looks at the information in the inmate's file; it may direct a further investigation, and must "obtain from the inmate as full and complete an explanation of his behavior in the situation as possible." Section 252.3(c)-(e). With the concurrence of at least two of the three members, the committee may then impose limited restrictions, the most serious of which is confinement in a special housing unit for a period of one week. Section 252.5. Where punitive sanctions are to be imposed, a "superintendent's proceeding" is provided before an impartial employee, at which formal written charges are filed, and notice and assistance given the inmate. The charge must be supported by substantial evidence, which is to include an interview with one or more of those who witnessed the incident. Sections 253.1 to 253.4. Punishment may then be imposed, including loss of privileges, change of program, confinement up to 60 days, special diet, loss of good behavior allowance ("good time"), and a requirement of restitution for intentional damage to state property. Section 253.5. Transfer is not specified among the sanctions to which a superintendent's proceeding may give rise.[6]

[6] The authority to transfer inmates is given by § 23 of the Correction Law, N.Y. Correction Law § 23 (McKinney Supp. 1974), which provides:

> 1. The commissioner of correction shall have the power to transfer inmates from one correctional facility to another. . . . The transfer shall be in accordance with rules and regulations promulgated by the department for the safe delivery of such inmates to the designated facility.

No provisions are set out governing the proper occasions for transfer, or the procedure for determining whether such an occasion in fact exists.

We have recounted New York's prescribed procedure at some length in order to emphasize the disparity in treatment accorded inmates punished thereunder, and those who are summarily transferred for rule infractions. Had Haymes' action in circulating the petition been considered merely a minor infraction, it ordinarily would have received nothing more than a reprimand. Had it threatened danger to prison security, or had Deputy Superintendent Smith's allegation that Haymes had on other occasions rendered unauthorized legal assistance proved true, a report would have been filed for adjustment committee review. If Haymes had been thought to deserve one of the enumerated punitive sanctions, a full superintendent's proceeding would have been held. It is, of course, much to the credit of the New York correctional system that such thorough, specific, and sensitive procedures have been codified to govern the enforcement of standards for inmate behavior. But it would be anomalous indeed, "both from a due process and an equal protection point of view, if the prison authorities could accomplish by transfer a procedure-free punishment which they could not accomplish within their own walls." *Gomes* v. *Travisono,* 490 F.2d 1209, 1215 (1st Cir. 1973).

III.

Haymes' allegation that his transfer was intended as punishment for his violation of Rule 21 would not merit relief, however, absent a showing that the move to the Clinton Correctional Facility in fact had consequences sufficiently adverse to be properly characterized as punitive. In granting summary judgment, the district court found that there was no allegation that the facilities at Clinton were "harsher or substantially different from those afforded to petitioner at Attica," citing *Wells* v. *McGinnis,*

344 F. Supp. 594, 596 (S.D.N.Y. 1972) (administrative transfer). Whatever may be the standards governing the need for hearing prior to administrative transfers, however, see *Newkirk* v. *Butler, supra,* note 4, we do not think it dispositive that both Attica and Clinton are maximum security facilities with similar programs. Rather, we find that the hardship involved in the mere fact of dislocation may be sufficient to render Haymes' summary transfer—if a trial establishes that it was punitive—a denial of due process.

The facts of this case may provide a good illustration of the real hardship in being shuttled from one institution to another. After being sent to Clinton, Haymes found himself several hundred miles away from his home and family in Buffalo, New York. Not only was he effectively separated by the transfer from his only contact with the world outside the prison, but he also was removed from the friends he had made among the inmates at Attica and forced to adjust to a new environment where he may well have been regarded as a troublemaker. Contacts with counsel would necessarily have been more difficult. A transferee suffers other consequences as well: the inmate is frequently put in administrative segregation upon arrival at the new facility, 7 N.Y.C.R.R. Part 260; personal belongings are often lost; he may be deprived of facilities and medications for psychiatric and medical treatment, *see Hoitt* v. *Vitek,* 361 F. Supp. 1238, 1249 (D.N.H. 1973); and educational and rehabilitative programs can be interrupted. Moreover, the fact of transfer, and perhaps the reasons alleged therefor, will be put on the record reviewed by the parole board, and the prisoner may have difficulty rebutting, long after the fact, the adverse inference to be drawn therefrom. One can easily comprehend the bitterness which may be engendered by the capricious infliction of such unwarranted

sanctions.[7] Small wonder, then, that the American Correctional Association has recognized that "[i]n any penal system embracing several institutions, transfer from one to another is often an effective disciplinary procedure as well as an administrative necessity." American Correctional Ass'n, Manual of Correctional Standards 416 (1972).

IV.

Because of the disposition we reach upon Haymes's claim that his transfer without hearing may have denied him due process if it was punitive in nature, we need not consider whether a genuine issue of material fact is raised by the allegation that the confiscated petition was special correspondence protected by Administrative Bulletin # 20. We note, however, that the mere fact that the petition requested no relief does not automatically withdraw it from the category of "legal assistance" governed by Rule 21. If those who signed the letter did not expect the court to act on it of its own accord—a fact which is not at all clear—they at least thought, as Haymes's brief admits, that the matter would be "referred . . . for investigation to other agencies, such as the FBI, interested public interest lawyers, or others . . ."

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[7] Although Haymes's complaint did not recite many of the deprivations we have enumerated, it is important to note that he was able to retain counsel only shortly before the district court rendered summary judgment. We think it proper that "the allegations of [a] *pro se* complaint [should be held] to less stringent standards than formal pleadings drafted by lawyers . . . ." *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (per curiam). The charge that he was punished by the fact of transfer at least entitled Haymes to a hearing to explain why the transfer was onerous to him.

Nor do we think that the prohibition of unauthorized legal assistance should be rendered nugatory in any situation where the product of the forbidden collaboration happens to be a letter written to a public official. The concern underlying prison rules on legal assistance is that "strong-willed inmates might exact hidden and perhaps non-monetary fees" in return for legal advice, thereby presenting a menace to prison discipline. *See Sostre* v. *McGinnis*, 442 F.2d 178, 202 & n.47 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 1049 *and* 405 U.S. 978 (1972); *Johnson* v. *Avery*, 393 U.S. 483, 488 (1969). It would be shortsighted indeed to permit subversion of this obviously rational policy by so transparent a ruse as a mere change of salutation on legal documents.

Reversed.

Order of the Court of Appeals Staying the Mandate.

74-1208

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of November, one thousand nine hundred and seventy-four.

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated October 25, 1974 to stay issuance of the mandate to and including November 4, 1974 pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

GRANTED.

IRVING R. KAUFMAN, Chief Judge.
J. JOSEPH SMITH
WILLIAM H. TIMBERS
Circuit Judges